(1) 89-1013

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

A. REGINALD EAVES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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December 21, 1989

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QUESTIONS PRESENTED

1. In an appeal in a criminal case, does a federal court of appeals have the option of declining to address an appellant's contentions of error where a ruling favorable to appellant would prove dispositive of the entire case against appellant?

2. Does a showing of an unwarranted racially motivated investigation of defendant by the Federal Bureau of Investigation entitle the defendant to discovery on the issue of selective prosecution and an opportunity to avail himself of the defense of selective prosecution at trial?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, A. Reginald Eaves, and the Respondent, United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. Reginald Eaves, by and through his attorney, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed in part and reversed in part Petitioner's convictions on Hobbs Act violations before the United States District Court for the Northern District of Georgia. Petitioner's Petition for Rehearing before the Eleventh Circuit Court of Appeals was denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 877 F.2d 943 (11th Cir. 1989). It is reproduced in the appendix hereto, p. 9a, infra.

An opinion of the United States District Court for the Northern District of Georgia is reported at 685 F Supp. 1243. It is reproduced in the appendix hereto, p. 3a, infra.

JURISDICTION

A four count criminal indictment charging violation of the Hobbs Act, 18 U.S.C. § 1951(a), was brought against the Petitioner on October 16, 1987. A jury returned a verdict of not guilty on one count and guilty on three counts on May 2, 1988. Appellant was sentenced to a period of incarceration and probation on June 27, 1988.

The Eleventh Circuit entered an order affirming in part and reversing in part on July 20, 1989. Rehearing was denied in an order entered September 21, 1989. A mandate issued October 4, 1989.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254.

RULES AND STATUTES IMPLICATED

28 U.S.C. § 1291.

The Courts of appeal (other than the United States Court of appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the District Courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The Jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the

jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

The Hobbs Act, 18 U.S.C § 1951(a).

STATEMENT OF THE CASE

In January of 1984, during the course of an investigation of corruption and fraud, Federal Bureau of Investigation Agent Gary Morgan contacted Atlanta Businessman Charles Edward Wood ("Eddie Wood") regarding some illegal activity in which Wood had been involved. (R6-205-206, 285).

Based upon Wood's statements, the F.B.I. initiated an undercover investigation of alleged corruption among local public officials. (R5-210, 211). Wood was to serve as a major actor in this investigation.

Special Agent Clifford Cormany was relocated to the Atlanta area to work in the investigation full time at the end of 1984. (RR9-725, 726).

In December of 1984, Wood and his partner, Clifford Hornsby, asked Al Johnson, former Fulton County Commission Clerk, to assist in getting a favorable vote on the rezoning of a project referred to as the "South Fulton" property. (R8-580-81). In March of 1985 the petition for rezoning was filed. (R9-730, 731). The following month, Johnson met with the Petitioner, Fulton County Commissioner A. Reginald Eaves. (R8-581). Johnson and Eaves discussed a proposed land development group involving Johnson, Wood, Hornsby and "Steve Hawkins" (R8-581, 586-87), as well as the requested rezoning of the South Fulton or "Peters Pond" property. (R8-583).

On June 5, 1985, the Fulton County Board of Commissioners denied the rezoning petition, but instructed the Planning Department to reinitiate the petition at no cost to WDH and to allow the petition to come before the Board out of turn at a subsequent meeting. (R8-594, 595). On June 19, 1985, Wood talked with Eaves by telephone (R7-369), and later met with Eaves. (R7-374). Wood alleges that during that meeting, he gave Eaves a $5,000.00 payment for Eaves' vote on the rezoning. (R7-374, 376). At some point in the investigation, Johnson started cooperating in the investigation in exchange for immunity for his own illegal activity. (R8-516). However, Johnson was not aware of the F.B.I.'s involvement in the rezoning efforts until after the zoning passed. The final Board action on the petition was taken in September of 1985. (R8-596). At the initiation of WDH and the F.B.I., the property was subsequently rezoned back to agricultural. (R9-811; R7-456).

In July of 1986, Agent Cormany ("Steve Hawkins") initiated another "Project" to serve as the basis for a rezoning request before the Fulton County Board of Commissioners. (R9-822).

Posing as "Hawkins", Cormany met with Petitioner on October 9, 1986 regarding the alleged "Fox Road project". Cormany alleges that he told Eaves that money would be available for Eaves' assistance on the project. (R10-842, 843). (Id. - 842-43; R15-1564).

By way of pretrial motions, Petitioner raised the defense of selective prosecution; however, Petitioner was denied discovery on such issue despite a strong prima facie showing of sufficient facts to raise reasonable doubt as

to the prosecutor's purpose for pursuing Petitioner's prosecution. (R1-10, 27, 35).

A four count indictment charging violations of the Hobbs Act, 18 U.S.C. § 1951(a), by accepting payments for the purpose of influencing his conduct in his position as a public official, was brought on October 16, 1987. Count I charged that Petitioner accepted a $5,000.00 payment from Charles Wood. Count II charged that on July 2, 1985, Petitioner accepted an $8,000.00 payment from a federal agent posing as "Steve Hawkins". In Count III, Petitioner was charged with accepting a $10,000.00 payment from "Hawkins" on August 11, 1987. Finally, Count IV charged that Petitioner accepted a $20,000.00 payment from "Hawkins" on September 4, 1987. (R1-1). Petitioner entered a plea of not guilty to each of the four counts of the indictment and was tried before a jury, the Honorable Orinda D. Evans presiding, beginning on April 12, 1988. The jury returned a verdict of not guilty on Count II and guilty on Counts I, III and IV on May 2, 1988. (R2-73). Appellant was sentenced to a period of incarceration and probation on June 27, 1988. (R1-78).

Appellant appealed to the Eleventh Circuit where he presented five issues for review. The issues were: (1) impact on interstate commerce; (2) unsolicited revision of a jury charge; (3) selective prosecution; (4) multiplicity and; (5) erroneous evidentiary rulings. The Eleventh Circuit considered only two of these issues. It upheld the district court's determination that there was sufficient evidence of a nexus with interstate commerce. With regard to the multiciplicity issue, the Court held that the district court

erred in refusing to dismiss either Count III or the indictment, and reversed the conviction on Count IV.

Appellant sought rehearing before the United States Court of Appeals for the Eleventh Circuit. Said request was denied on September 21, 1989. (Appendix, p. 1a.)

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit decision to not consider any of the three remaining issues presented by Petitioner was a departure from accepted judicial proceedings and calls for exercise of this Court's power of supervision. Each of the issues which the District Court declined to consider was related to the entire case against Petitioner. The challenged jury charge related to interstate commerce and thus affected all counts charged against Petitioner. The selective prosecution issue was related to the prosecution in its entirety. Finally, the challenged rulings affected all counts. By concluding its review after reversing on an issue which did not affect Petitioner's sentence, the Court effectively deprived Petitioner of his right to an appeal, pursuant to 28 U.S.C. § 1291. In this regard the Eleventh Circuit's approach differed from decisions which reverse the entire case on one issue and decline to consider other issues which will not affect the outcome of the appeal.

Illustrative of the error of the Eleventh Circuit's refusal to consider any further issues is the selective prosecution issue raised by Petitioner. Pursuant to this Court's decision in *United States v. Wayte*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 842 L.Ed.2d 547(1985), it is well established that prosecutorial discretion is not unfettered, and the decision to prosecute may not be based upon unjustifiable

standards including race. When a defendant raises a claim of selective prosecution it should be evaluated according to ordinary equal protection standards. *Id.* The Eleventh Circuit has interpreted this standard to impose a two-part burden upon the Defendant. That Court has held that the "Defendant must establish first, that he has been singled out for prosecution while others similarly situated have not generally been proceeded against for the type of conduct with which he has been charged and second, that the decision to prosecute was invidious or in bad faith because it was based upon an impermissible factor such as race." *United States v. Gordon*, 817 F. 2d 1538, 1539 (11th Cir. 1987). The Defendant is entitled to discovery on selective prosecution if he presents sufficient facts to show that the issue is more than frivolous.

By declining to consider this issue, the Eleventh Circuit deprived Petitioner of review of a significant issue. At the district court level, petitioner met his burden of establishing an entitlement to discovery on the selective prosecution issue and the right to present the defense. Accompanying the motion for discovery on this issue were two affidavits. (R1-10) The first was the affidavit of Professor Mary R. Sawyer of Iowa State University. Dr. Sawyer has conducted a definitive study of the selective prosecution of black politicians by the federal government. In her affidavit Professor Sawsyer states:

> "I have concluded, based on my studies cited above, that black elected officials are more readily prosecuted by the federal government, and more readily subject to pursuit and investigation by the FBI than similarly situated white elected officials. Blacks are subject to more

scrutiny and investigation by the FBI than whites, and this has caused a diminishment in the effectiveness of black politicians."

In addition to the affidavit of Professor Sawyer, defendant submitted the affidavit of Mr. Hirsch Friedman. Mr. Friedman is an attorney licensed to practice in the State of Georgia, and he served as an informant working with the F.B.I several years ago. Mr. Friedman testified, based on his own personal knowledge, as to specific evidence concerning the selective prosecution of the instant defendant and the invidious motivation behind his prosecution. Among other things, Mr. Friedman testified as follows:

9.

Shortly after I began working with the FBI in 1979, I was made aware of an "unofficial" policy of the FBI which was generally referred to by Special Agent John McAvoy as "Fruhmenschen." The purpose of this policy was the routine investigation without probable cause of prominent elected and appointed black officials in major metropolitan areas throughout the United States. I learned from my conversations with special agents of the FBI that the basis for this policy was the assumption by the FBI that Black officials were intellectually and socially incapable of governing major government organizations and institutions.

10.

An upshot of the FBI's Fruhmenschen policy in Atlanta was the investigation generally referred to in the Atlanta FBI field office as "Blue Eyes,

Green Eyes and Brown Eyes." This investigation specifically referred to: "Blue Eyes," Eldrin Bell, a top-ranking black police official in Atlanta who has blue eyes; "Green Eyes," Maynard Jackson, the black Mayor of Atlanta at the time who has green eyes; and "Brown Eyes," A. Reginald Eaves, the Defendant in this case who has brown eyes. The investigation had targeted these particular individuals with the aim of prosecuting them if possible although there was no probable cause to have started the investigation.

11.

The Fruhmenschen policy of the FBI and the Blue Eyes, Green Eyes, Brown Eyes investigation were conducted throughout the period, 1979-1982, that the undersigned worked with the FBI in Atlanta as described herein. During this time, Special Agent John McAvoy was the first supervisor of the Eaves' investigations.

12.

FBI agents and an Atlanta Police detective assigned to work with the FBI would routinely discuss the progress of their investigations with me. I understood that over a dozen indictable cases against white officials and others in the Northern District of Georgia were dropped and investigations discontinued altogether during this period of time while great effort was put forth in connection with the Fruhmenschen policy and pursuit of the "Blue Eyes, Green Eyes, and Brown Eyes" case, notwithstanding the absence of indictable cases against these three particular targets.

13.

> In one instance during this period of time, information was received by the FBI that a then sitting Judge in the Appellate System had received the sum of $15,000.00 in exchange for the Judge's vote and the use of his influence in connection with a case then pending before the Court on which he was then a member. This information was considered reliable by the FBI. Special Agent John McAvoy was instructed by his superiors not to pursue an investigation of this matter because it was "too explosive." The Judge involved was white.

14.

> Special Agent McAvoy, in the presence of others, routinely made remarks regarding the targets of his investigative efforts which the undersigned took as strictly racist. An example of these remarks used in connection with his investigation of elected and appointed black officials in the Northern District of Georgia would be, "We've got to get the Fruhmenschen!" (Affidavit of Hirsch Friedman). (R1-10).

Mr. Friedman also testified as to a particular specific instance where the F.B.I. sought to bribe Petitioner as early as 1979. Notwithstanding the fact that that effort was unsuccessful, the F.B.I. pursued other attempts to bribe Petitioner with continuing lack of success. Mr. Friedman testifies that:

> "I told Special Agent John McAvoy that there appeared no basis for believing that Commissioner Eaves was about to break any law involving the abuse of public office, and no basis

> for pursuing him. In light of that, I asked him why the FBI continued to focus on Eaves. His reply was simply that they pursue an investigation because Eaves was a Fruhmenschen and would thus have to break the law. McAvoy used Fruhmenschen to describe black people. The undersigned understood from this and his knowledge of the investigations by the FBI, that the investigation of Eaves and the other black elected and appointed officials in the Northern District of Georgia was based upon suspicion and racial bias and not upon reliable information or evidence."

The evidence presented by Petitioner far exceeds the general evidence presented in *United States v. Gordon, supra,* which was deemed sufficient to require production of evidence and allow presentation of the defense of a selective prosecution. Thus this Court should grant a writ of certiorari and consider this appeal from the Eleventh Circuit's decision.

CONCLUSION

For the reasons stated, Petitioner respectfully petitions this court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Counsel for Petitioner

December 21, 1989

APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 88-8479

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

A. REGINALD EAVES,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion July 20, 1989, 11 Cir., 198___, ____F.2d____).
(September 21, 1989)

Before TJOFLAT and EDMONDSON, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Tjoflat
United States Circuit Judge

UNITED STATES of America

v.

A. Reginald EAVES.

Cr. No. CR87-406.

United States District Court,
N.D. Georgia,
Atlanta Division.

April 15, 1988.

William Gaffney, William McKinnon, Asst. U.S. Attys., Atlanta, Ga., for plaintiff.

Jack Goger, Charles Floyd, David Walbert, Atlanta, Ga., for defendant.

Terrence B. Adamson, Peter C. Canfield, James A. Demetry, Dow, Lohnes & Albertson, Atlanta, Ga., for WSB-TV.

ORDER

ORINDA D. EVANS, District Judge.

This criminal case is before the court on motion by several television and radio stations in the Metropolitan Atlanta area who seek access to copies of any videotapes and audiotapes[1] which are admitted into evidence during this trial.

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[1] All of the videotapes include a sound component. Basically vidotapes were made of meetings when money was to change hands. Sound recordings only, *i.e.*, audiotapes, were made of other meetings. The

The Defendant, A. Reginald Eaves, is charged with receiving money in violation of the Hobbs Act. The indictment arose as a result of a "sting" operation during which the FBI made video and audiotapes of Eaves allegedly accepting bribes from undercover FBI operatives. It is anticipated that a large number of these video and audiotapes will be admitted into evidence at trial. Several local television and radio stations have requested access to the admitted portions of these tapes, presumably to copy and rebroadcast them on television and radio.

Binding precedent in this Circuit holds that there is no absolute First Amendment right to inspect judicial records. *Belo v. Clark*, 654 F.2d 423 (5th Cir. Unit A 1981).[2] Instead, the media's access to such materials rests on a common-law right to inspect and copy judicial records. The Eleventh Circuit has held,

> The right to inspect and copy records is not absolute, however. [citations omitted]. As with any other form of access, it may interfere with the administration of justice and hence may have to be curtailed. *See Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir.1981) (affirming denial of access to audiotapes admitted into evidence out

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bulk of the tapes are audiotapes rather than videotapes. Both audiotapes and the sound portion of the videotapes have been reduced to written transcripts. The press' access to the transcripts, once they are admitted into evidence, has been allowed by verbal ruling on April 14, 1988.

[2] All former Fifth Circuit cases, including Unit A cases, decided prior to October 1, 1981 are binding precendent in the Eleventh Circuit. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33 (11th Cir.1982). *Belo* was decided in August of 1981.

> of concern with a yet-to-be-tried defendant's right to a fair trial). The historic presumption of access to judicial records must be considered in the balance of competing interests. *Id.*, at 434.

Newman v. Graddick, 696 F.2d 796, 803 (11th Cir.1983). The initial determination of how these competing factors ought to be evaluated is left to the discretion of the district court. *Id.*

In *Newman*, the Eleventh Circuit laid out the factors which a district court should consider when balancing the common-law right of access against important competing interests. First, district courts should look to whether the records are sought for illegitimate purposes, such as to promote scandal or to gain an unfair commercial advantage. Second, the court must determine whether access is likely to promote public understanding of a historically significant event. Third, the court must determine whether the press has already been permitted substantial access to the contents of the records. In addition, the court may also consider whether administrative difficulties in providing access would disrupt the progress of the trial. Finally, the ability of the defendant to get a fair trial if access is granted in the "primary ultimate value to be weighed on the non-access side of the balance." *Newman*, 696 F.2d at 796; *United States v. Rosenthal*, 763 F.2d 1291, 1294 n. 5 (11th Cir. 1985).

In this case, the court finds that access to the video and audiotapes is not sought for illegitimate purposes, and that public dissemination of the tapes is likely to promote public understanding of a "historically significant event," at least in terms of local politics. Further, the

court finds that the press has already been given substantial access to the context of the tapes. There are reporters in the courtroom making notes of the proceedings, and the transcripts of admitted recordings will be released to the media once the tapes are admitted into evidence. The court further finds that the administrative difficulties in providing access to the tapes are not insurmountable. Thus, the only factor weighing against release of the tapes is the effect that widespread dissemination of the tapes may have on Defendant's right to a fair trial.

Most cases regarding media access to video and audiotapes of this nature have discussed the potential impact that release of such tapes could have on the defendant's ability to choose an impartial jury from a community exposed to news broadcasts of the government's case-in-chief. *See, e.g., United States v. Criden*, 648 F.2d 814 (3rd Cir.1981); *In re National Broadcasting Co., Inc.*, 653 F.2d 609 (D.C.Cir.1981). In this case the jury has already been selected. Thus, Defendant is not arguing that media dissemination of the tapes themselves would inhibit his ability to chose an impartial jury; rather, he argues that dissemination of the tapes at this point in the proceedings could unfairly galvanize hostility towards him. He argues that the tapes depict, both visually and through vocal nuances, an artificial relationship with undercover operatives that portrays Mr. Eaves in an unfairly negative light. He contends that release of the tapes as they are introduced by the government, before Defendant has had a chance to present his evidence regarding the context of the taped conversations, could provoke attempts to tamper with the jury, which is already in the process of hearing the case. Defendant contends that the "live" tapes

would be more provocative than the transcripts alone, and hence more likely to engender interference with the trial.[3] The government agrees with Defendant's position on this issue.

Although Defendant is discussing a hypothetical situation, jury tampering does occur, and remains a real possibility in any high-profile, controversial case. *See e.g., United States v. Pennell*, 737 F.2d 521 (6th Cir.1984) (five jurors received anonymous telephone calls at home urging them to find defendant guilty, "or else."); *United States v. Williams*, 737 F.2d 594 (7th Cir.1984) (five jurors contacted at home during criminal trial). Defendant's concern about such attempts is strengthened by the fact that this case has already received substantial publicity. Defendant has, according to counsel's representations to the court, already received "hate mail" and other hostile contacts.

The court is aware that it is difficult to determine whether release of the tapes would have a substantially greater inflammatory impact on the viewing public than release of the transcripts alone. The court is also aware that it is being asked to evaluate a hypothetical possibility of jury tampering. However, it must evaluate these factors in light of the admonition that, "It is better to err, if err we must, on the side of generosity in the protection of a defendant's right to a fair trial before an impartial jury." *Belo*, 654 F.2d at 431.

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[3] The Defendant also objected to release of the transcripts.

Having considered all of the relevant factors, the court has determined that portions of the tapes which are admitted into evidence at trial will be released to the media. However, they will not be released until the close of the evidence. To the degree that release of the tapes could provoke an unfair negative reaction, such reaction may be tempered by allowing Defendant a chance to present his case in court before having the tapes exposed to the public. In this way a person watching or hearing the tapes would hopefully evaluate them in light of all the evidence produced at trial. Further, release of the tapes at the close of the evidence will diminish the not insubstantial administrative difficulties involved in providing a copy of the admitted portions of the tapes to the media. Finally, the court strongly disagrees with the movants' suggestions that a delay in access is "tantamount . . . to denying such access altogether." The public's right of access to judicial material is not necessarily a right to instantaneous access; nor does the media's right to inspect such materials include a guarantee that they will be released when the effect of their dissemination would be the most sensational. The court is not imposing a substantial delay. At least one court has noted that the inherently controversial nature of these types of tapes generates public interest in viewing them even when they are not released until after conclusion of the trial. *See Application of National Broadcasting Co., Inc.*, 635 F.2d 945, 949 (2nd Cir.1980).

Accordingly, the motion to allow access to the portions of the audio and videotapes actually admitted into evidence in this case is GRANTED IN PART and DENIED IN PART.

UNITED STATES of America,

Plaintiff-Appellee,

v.

A. Reginald EAVES,

Defendant-Appellant.

No. 88-8479.

United States Court of Appeals,
Eleventh Circuit.

July 20, 1989.

Charles R. Floyd, Jr., Thomas F. Jones, Floyd, Jones & Ware, Atlanta, Ga., for defendant-appellant.

William L. McKinnon, Jr., Asst. U.S. Atty., Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT and EDMONDSON, Circuit Judges, and ATKINS*, Senior District Judge.

ATKINS, Senior District Judge:

The defendant/appellant A. Reginald Eaves was a member of the Fulton County Board of Commissioners ("Board") elected in 1978 and sworn in as a Fulton County

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

Commissioner in 1979. In October of 1987, Eaves was charged with four violations of the Hobbs Act. After a plea of not guilty, Eaves was tried and convicted on three of the four counts. He appeals from that conviction and asserts five separate grounds of error. We are persuaded by the appellant's argument that counts three and four were multiplicitous and thus reverse his conviction on count four of the indictment. The remaining convictions are affirmed.

FACTS

In early 1984, Special Agent Gary Morgan of the Federal Bureau of Investigation ("FBI") approached Charles Edward Wood ("Wood") about certain illegal activity in which Wood was allegedly involved. Wood offered to provide the FBI with information in exchange for immunity from prosecution.

Wood claimed that he had paid local public officials for votes and influence favorable to his pipeline and sewer business. He testified that during 1981 he paid Eaves $1,250.00 per month as a consultant for which Wood expected Eaves to help him obtain government contracts in the Atlanta area. After five or six months, Wood suspended payments because he believed the arrangement had not been profitable and told Albert Johnson, the former clerk of the Board, that any further business with Eaves would involve specific payments for specific work. Wood testified that in July of 1982, he paid Eaves $2,000 to push the Fulton County Public Works Department to approve plans for a subdivision for which Wood was providing the pipeline and sewer work, and that in August of that same year, he paid Eaves $2,500 to

accelerate the recordation of a subdivision plat. Based upon this information, the FBI began an investigation into corruption of public officials which resulted in the indictment and conviction of Reginald Eaves.

The FBI used Wood and his business as the catalyst for its investigation. It provided WDH, a partnership formed by Wood, John Dedicher, and Clifford Hornsby, with office space and a telephone. Agent Clifford Cormany was relocated to Atlanta where he assumed the identity of a fictitious investor by the name of Steve Hawkins. Cormany, as Hawkins, accompanied Wood and Hornsby and observed their day to day activities to document any corrupt business dealings in which Wood might become involved while conducting his affairs.

When the FBI began its investigation, Wood and Hornsby had an option to purchase a piece of property which was zoned for agricultural use. The property ("Peters Pond project") was owned by the Barnett Bank in Jacksonville, Florida. The FBI subsidized the first of three payments to extend the option on the land in 1984, and WDH made two in 1985. Wood forwarded these payments from Atlanta to the bank in Jacksonville. Wood and Hornsby planned to rezone and develop the property and approached Al Johnson to solicit his aid. In April of 1985, Wood asked Johnson to contact Eaves and ask for his help.

Johnson met with Reginald Eaves on April 16, 1985, and discussed the need for his vote on the Peters Pond project. Johnson testified that Eaves committed his vote for rezoning the land at that meeting. On May 1, the Board deferred the vote. On June 4, the day before the

vote was scheduled, Johnson again met privately with Eaves and asked him how much money he required for a favorable vote. Johnson testified that Eaves held up his hand to demonstrate the number five and nodded in the affirmative when Johnson asked, "$5,000?" On June 5, the Board approved rezoning the Peters Pond project subject to submission of a new petition requesting zoning for single family homes in lieu of the suggested apartment dwellings. On June 19, Al Johnson paid Eaves $5,000 in cash. On September 4, the Board reconsidered the Peters Pond project pursuant to the new petition and granted rezoning.

On August 15, 1985, Agent Cormany, as Steve Hawkins, lunched with Eaves and Johnson. "Hawkins" represented to Eaves that he, "Hawkins," spoke for a number of investors who were scattered throughout the country. He was interested in developing land in the Atlanta area and wanted Eaves to help him with any zoning problems. "Hawkins" testified that Eaves acknowledged that he understood and was willing to cooperate.

In July of 1986, Eaves and "Hawkins" again met. "Hawkins" stated that he wished to develop a certain piece of property ("Fox Road Property") at the highest density possible and suggested to Eaves that money was available for his vote. They did not communicate from December of 1986 until late March of the following year. On April 6, 1987, "Hawkins" filed a petition to rezone the Fox Road property from agricultural to R-5 use, the highest density classification. The planning department of Fulton County and the planning commission both recommended denial. Eaves urged "Hawkins" to meet with

the commissioners so that rezoning would not look like "a straight payoff." On June 3, the vote on the Fox road project was delayed. Thereafter, "Hawkins" reached a compromise with the community and the planning staff by which they agreed to an R-4 classification.

On August 3, 1987, Eaves told "Hawkins" that for $30,000 "to split" he would have his R-5 classification for the Fox Road property. "Hawkins" agreed and on August 5, when the Fox Road property came before the Board, Eaves moved that it be granted as submitted and voted in favor of an R-5 zoning classification.

Eaves and "Hawkins" met in a suite at the Hyatt Regency Hotel in Atlanta on August 11, 1987, where he offered partial payment in the amount of ten thousand dollars. Eaves refused telling "Hawkins" to keep the money until he had the entire thirty thousand. Later in the day, Eaves changed his mind and accepted the ten thousand. On September 4, "Hawkins" paid Eaves the remainder for the agreed upon amount.

Eaves was indicted on four counts which alleged separate violations of the Hobbs Act, 18 U.S.C. § 1951(a). Count I charged that Eaves accepted a $5,000 payment from Charles Wood. Count II alleged that Eaves accepted an $8,000 payment from Agent Cormany as Hawkins on July 2, 1985. Count III charged Eaves with accepting a $10,000 payment from "Hawkins" on August 11, 1987, and Count IV charged Eaves with accepting $20,000 on September 4. Eaves was tried and convicted on Counts I, III, and IV.

Eaves challenges his conviction on five distinct grounds. He contends that the government failed to establish an impact on interstate commerce, an essential element of a Hobbs Act violation, and thus the district court should have dismissed the indictment. Eaves also challenges the district court's additional charge on interstate commerce given to the jury on the third day of its deliberations. Eaves assets that he was the victim of wrongful and insidious selective prosecution and that limitations on his counsel's examination of witnesses prevented him from presenting a full and adequate defense. Finally, Eaves argues, persuasively, that counts III and IV were multiplicitous.

IMPACT ON INTERSTATE COMMERCE

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do . . ." violates the Hobbs Act. 18 U.S.C. § 1951(a). The indictment charged the appellant with extortion and attempted extortion in each count. At the close of the evidence, the trial court granted the motion for judgment of acquittal on the substantive violation charged in counts III and IV but denied the motion in its entirety as it related to count I and for the attempt charged in counts III and IV.

The broad language of the Hobbs Act manifests an intention "to use all the constitutional power Congress has to punish interference with interstate commerce. . . ." *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 272, 4 L.Ed 2d 252 (1960). In count I, Eaves was convicted of a substantive violation of the Hobbs Act which is generally

supported by evidence of an actual effect on interstate commerce. *See, e.g., United States v. Janotti*, 673 F.2d 578, 591 (3d Cir.1982) (citing *United States v. Mazzei*, 521 F.2d 639, 642 (3d Cir.1982) (en banc)). The effect need be only *de minimis* to sustain the exercise of jurisdiction, *see, e.g., United States v. Tuchow*, 768 F.2d 855, 870 (7th Cir.1985); *United States v. Sorrow*, 732 F.2d 176, 180 (11th Cir.1984), and the facts before this court demonstrate the requisite element for conviction of the substantive offense charged in count I.

The government relied upon the fact that Charles Wood and Clifford Hornsby, as WDH Developers, were engaged in the business of land development. The $5,000 payment to Eaves insured his support for the rezoning petition filed by WDH which Wood and his partner intended to be the first step in development of the Peters Pond project. Before, during, and after the payoff, WDH sent option payments for the purchase of the property from Atlanta, Georgia, to a bank in Jacksonville, Florida. Although the $15,000 payment was provided by the FBI, the payments in the amount of $10,000 and $25,000 were made by WDH. The fact of the FBI's involvement, however, does not negate the fact of jurisdiction. *See, e.g., United States v. Holmes*, 767 F.2d 820, 824 (11th Cir.1985) (FBI represented a fictional business entity); *United States v. Rindone*, 631 F.2d 491, 493 (7th Cir.1980) (FBI supplied payoff money). The movement of the money in interstate commerce sufficed as a jurisdictional prerequisite.

The appellant stresses that the lack of potential for an impact on interstate commerce is even more apparent in the context of counts III and IV. Counts III and IV charged the inchoate offense of an attempt to violate the Hobbs

Act. The appellant argues that every aspect of the Fox Road project was a pretense; the FBI did not even use a private entity as part of its scheme and thus there was no possibility of a project at all and no possibility of a project which would affect interstate commerce. This argument has been soundly rejected as we follow suit. *See, e.g., United States v. Holmes*, 767 F.2d at 824 ("The fact that the FBI undercover agent represented a fictitious business entity is not a defense to an extortion charge.") (citing *United States v. Brooklier*, 685 F.2d 1208, 1217 (9th Cir.1985) (though FBI business establishment was a fiction, jurisdiction sustained for Hobbs Act violation); *United States v. Janotti*, 673 F.2d at 592-94; *United States v. Smith*, 749 F.2d 1568, 1569 (11th Cir.1985) (per curiam) (fact of government agent's disguise as "real" victim no obstacle to jurisdiction)).

MULTIPLICITY

The district court erred when it refused to dismiss either count III or IV of the indictment. The evidence offered in support of those charges demonstrated that only one transaction formed the basis for both charges. The government created multiple charges by manipulating the logistics of the payments. We reverse the appellant's conviction on count IV.

The concept of multiplicity arises from charging a single offense in more than one count. *See, e.g., Ward v. United States*, 694 F.2d 654, 661-62 (11th Cir.1983) (citations omitted). The Supreme court's articulation of this concept in the seminal case of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), distinguished between those offenses which by their nature are continuous and

those which are committed *uno actu*. " '[W]hen the impulse is single, but one indictment lies, no matter how long the action may continue. If successive impulses are separately given, even though all unite in swelling a common stream of action, separate indictments lie.' " 284 U.S. at 302, 52 S.Ct. at 181 (quoting Wharton's Criminal Law, § 34).

A conviction for extortion under the Hobbs Act requires that (1) the defendant induced his victim to part consensually with property (2) either through the wrongful use of actual or threatened force, violence or fear or under color of official right (3) in such a way to adversely affect interstate commerce. *United States v. Smalley*, 754 F.2d 944, 947 (11th Cir.1985) (citations omitted). "Each relinquishment of property manifesting all these elements is a separate offense that may be the subject of a separate count." *Id*. (citation omitted). Relying on this proposition, the government argues that each installment of the agreed upon payment for the favorable vote contained all of the elements of a Hobbs Act violation and thus was properly the subject of two counts charged in the indictment.

We disagree. The crime for which the appellant was charged in counts III and IV was one in which the impulse was single. Although Eaves accepted two payments, they were, in fact, two parts of a whole. The circumstances before this court are easily distinguishable from those cases in which each of many acts forwards a single underlying purpose. *See, e.g., United States v. Tolub*, 309 F.2d 286, 289 (2d Cir. 1962) (each acceptance of payment by defendant during continuance of the same underlying con-

ditions was a separate act of extortion). The payments at issue in this case were "installments of a lump sum." *See id.*

Even a cursory review of the record reveals the fact that the division of the agreed upon amount into two separate payments was at the behest of the government and for its convenience. Charging more than one violation under the facts that form the basis of counts III and IV would give the government unfettered discretion to determine how many crimes with which to charge a defendant by manipulating the methods of payment. The facts before this court demonstrate unequivocally that counts III and IV charged the same offense and were multiplicitous. Therefore the appellant's conviction for count IV of the indictment is reversed.

After a thorough review of the record, we decline to address the appellant's remaining contentions of error. Thus, consistent with the opinion of this court, the appellant's conviction on count IV of the indictment is REVERSED. The remaining convictions are AFFIRMED.